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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 1004

AIR DISPATCH, INC., ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

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April 21, 1965.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

Appellees, National Association of Motor Bus Owners, National Bus Traffic Association, Inc., American Trucking Associations, Inc.,[1] and the National Motor Freight Traffic Association, Inc. intervened as defendants in the action below pursuant to 28 U.S.C. §2323, as associations of motor carriers of passengers and property who were parties to the proceeding before the Interstate Commerce Commission in which the order under review was made. Pursuant to Rule 16(1)(c) of the Rules of this Court, these Appellees move that the judgment of the District Court be affirmed.

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[1] American Trucking Associations, Inc., is erroneously shown as a party to the Jurisdiction Statements filed by Appellants.

Statement of Case

Section 203(b)(7a) of the Interstate Commerce Act, 49 U.S.C. §303(b)(7a), exempts from economic regulation by the Interstate Commerce Commission "the transportation of persons or property by motor vehicle when incidental to transportation by aircraft. . . ." Pursuant to the requirements of Section 4 of the Administrative Procedure Act, 5 U.S.C. §1003, the Interstate Commerce Commission instituted a rule making proceeding, *Motor Transportation of Property Incidental to Transportation by Aircraft*, 95 M.C.C. 71 (1964) (J.S. 7a-45a), to define the scope of the partial exemption granted by Section 203(b)(7a). The regulations subsequently adopted by the Commission, insofar as they are in issue here, defined transportation of property by motor incidental to transportation by aircraft within the meaning of Section 203(b)(7a) as transportation in bona fide collection, delivery, or transfer service within air cargo terminal areas described in the tariffs of air carriers filed with the Civil Aeronautics Board, when performed on through air bills of lading covering both the line haul movement by air and the collection, delivery or transfer service by motor.

Appellants filed suit in the United States District Court for the Eastern District of Pennsylvania to set aside the Commission's report and order. Since that report and order did not run against Appellants individually and did not require them to do or refrain from doing anything, the only justiciable issue on Appellants' complaint to the District Court, and hence the only issue here, is the jurisdiction of the Commission to define the scope of the exemption from its economic regulatory authority granted by Section 203(b)(7a) of the Interstate Commerce Act. As the court below said:

"[The] determination [of this issue] is dispositive of this litigation since inquiry into the substance of the regulations would be premature. No conflict between the [Civil Aeronautics] Board and the Commission has arisen nor have these regulations been attacked as an unreasonable exercise of the authority vested in the Commission." (J.S. 6a).

Addressing itself to the issue of the Commission's jurisdiction, the District Court held:

"It cannot be argued that the Commission lacks jurisdiction to regulate all common carriers (motor vehicles) involved in the movement of goods in interstate commerce to the extent that the issue involved pertains to (1) the qualifications of employees of the common carriers, (2) the maximum hours of work by employees, (3) the safety regulations to be followed by the carriers, or (4) the equipment standards to be met by the carriers. The Commission also has authority to economically regulate all motor vehicles involved in interstate commerce except when the motor vehicles are used exclusively in the collection, delivery or transfer of goods incidental to transportation by aircr[illegible] Excluding this partial exemption of Section 203 (b)(7a), the Commission has regulatory authority over all motor vehicles in interstate commerce. The determination of the scope of this exemption from economic regulation must logically fall on the Commission. Whether this determination is accomplished on an ad hoc basis as in *Kenny* and the cases following that decision, or by use of the rule making power does not

alter the right to make such a determination." (J.S. 4a-5a).[2]

ARGUMENT

Jurisdiction Of The Interstate Commerce Commission

The theory of Appellants' case is that the Interstate Commerce Commission has no economic regulatory authority over any transportation by motor vehicle rendered in connection with transportation by air. This is untenable. Part II of the Interstate Commerce Act vests in the Interstate Commerce Commission regulatory authority over "the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce. . . ." Section 202(a), 49 U.S.C. §302(a). Interstate commerce is "commerce between any place in a State and any place in another State or between places in the same State through another State, *whether* such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express or water." Section 203(a)(10), 49 U.S.C. § 303(a)(10), emphasis supplied.

Appellants argue that the "whether" clause following the definition of interstate commerce compels the conclusion that a motor carrier is not engaged in transportation in interstate commerce within the meaning of Section 203(a)(10) if the transportation it performs is preceded or followed by air transportation. This misconstrues the effect of that clause. It does not narrow the definition of interstate commerce that immediately precedes it, nor is its effect to exempt any motor carriers engaged in the interstate commerce defined in Section 203(a)(10) from the regulatory

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[2] The *Kenny* Case to which the District Court referred is *Kenny Extension—Air Freight*, 49 M.C.C. 182 (1949), 61 M.C.C. 587 (1953), in which the Commission enunciated and applied on an *ad hoc* basis the definition its rules in issue codify.

authority vested in the Commission by Section 202(a). On the contrary, the effect of the clause is simply to make clear that notwithstanding that motor carriers join with rail or water carriers or express companies in the performance of transportation in interstate commerce, they are to be regulated under Part II and not under any other part of the Interstate Commerce Act.

All of the exemptions from economic regulation by the Interstate Commerce Commission are contained in Section 203(b), which exempts various types of motor transportation, including in subsection (7a) transportation "incidental to transportation by aircraft." If, as Appellants assert, Section 203(a)(10) removed all motor transportation preceded or followed by transportation by aircraft from the sweep of the Interstate Commerce Act the exemption in subsection (7a) would be meaningless. The Congress does not enact meaningless legislation and the courts will not construe statutes on the assumption that it does. Hence, statutes are construed, if possible, to give every section of them force and effect. *United States* v. *Menasche*, 348 U. S. 528, 538, 539 (1955); *Markham* v. *Cabell*, 326 U. S. 404, 409 (1945); *United States* v. *Powers*, 307 U. S. 214, 217 (1939). Moreover, if Section 203(a)(10) excluded all motor transportation in connection with air transportation from the Interstate Commerce Act the Commission would not have the authority Appellants concede it has, namely authority under Section 204(a)(1), 49 U.S.C. §304(a)(1), to regulate the qualifications and hours of service of employees, safety of operations and standards of equipment of motor carriers engaged in such transportation.

Furthermore, Appellants' premise ignores and would render meaningless Section 1003(a) of the Federal Aviation Act, 49 U.S.C. §1483. That Section authorizes air carriers to "establish through service and joint rates, fares,

and charges with other common carriers." It provides that in case of "through service by air carriers and common carriers subject to the Interstate Commerce Act, it shall be the duty of the carriers parties thereto to establish just and reasonable rates . . . and if joint rates shall have been established just, reasonable, and equitable divisions [thereof] as between the carriers participating therein." Tariffs are required to be filed with both the Civil Aeronautics Board and the Interstate Commerce Commission, and both the rates and the divisions of joint rates are subject to regulation by a joint board comprised of an equal number of members of each agency. Obviously the Congress enacted these provisions in recognition of the fact that the Interstate Commerce Commission has economic regulatory authority over motor transportation when in combination with air transportation except that which is "incidental to transportation by aircraft" within the meaning of Section 203(b)(7a).

Moreover, the Congress confirmed the Commission's jurisdiction to economically regulate motor carriers engaged in transporting air freight when it amended Section 1003 of the Federal Aviation Act to permit air and surface carriers to render through service at a combination of their local rates, published in the case of motor carriers in tariffs filed with the Commission and in the case of air carriers in tariffs filed with the Board.[3] In hearings on that amendment the General Counsel of the American Trucking Associations explained that:

> "Motor carriers already have local rates published. This is necessary under part II of the Interstate Commerce Act. It is understood that the air carriers

[3] Section 1003(b), as originally enacted in 1938 (52 Stat. 1020), required the establishment of joint rates and a consequent system of divisions for air and motor carriers to provide a through service.

> also have ready for use their tariffs of local rates; a combination of such rates to provide through service is permitted as between surface carriers but prohibited as between surface carriers and air carriers. The motor carriers with their presnt publications are ready and willing to provide through service with the air carriers by combining the local rates. . . ." S. Rep. 510, 80th Cong., 1st Sess., p. 4.

The consistent construction of a statute by the agency charged with administering it is of course entitled to great weight. The Commission has exercised for many years the authority Appellants contend it does not have, sometimes to grant and sometimes to deny licenses to operate, and sometimes to hold no license necessary by virtue of the exemption in Section 203(b)(7a). See, for example, *Port Columbus Cab Co., Contract Carrier Application,* 24 M.C.C. 237 (1940); *Railway Express Agency, Inc. Ext.—West Warwick,* R.I., 31 M.C.C. 332 (1941); *Railway Express Agency, Inc. Ext.—West Unity-Middletown,* 31 M.C.C. 363 (1941); *Railway Express Agency, Inc. Ext.—Bristol, R.I.,* 31 M.C.C. 385 (1941); *Railway Express Agency, Inc. Ext.—Clarksburg-Buckhannon,* 31 M.C.C. 700 (1942); *Sky Freight Delivery Service, Inc. Common Carrier Application,* 47 M.C.C. 229 (1947); *Golembiewski Common Carrier Application,* 48 M.C.C. 1 (1948); *Peoples Express Co., Ext.—Air Freight,* 48 M.C.C. 393 (1948); *Koch Common Carrier Application,* 49 M.C.C. 555 (1949); *Kenny Extension—Air Freight,* M.C.C. 182 (1949); *Kenny Extension—Air Freight,* 6 M.C.C. 587 (1953); *Commodity Haulage Corp. Common Carrier Application,* 69 M.C.C. 527 (1957); *Southern Pacific Transport Co.—Air Freight,* 73 M.C.C. 345 (1957); *Michaud Common Carrier Application,* 73 M.C.C. 677 (1957); *Scari Extension—Airports,* 76 M.C.C. 319 (1958); *Vanden Heuvel Extension—Bendix and Midway*

Airports, 78 M.C.C. 41 (1958); *Fischer Common Carrier Application*, 83 M.C.C. 229 (1960); *Panther Cartage Co. Extension—Air Freight*, 88 M.C.C. 37 (1961); *Nickerson Common Carrier Application*, 88 M.C.C. 186 (1961); *Air Cargo Terminals, Inc., Extension—San Bernardino, Calif.*, 88 M.C.C. 468 (1961); *Wycoff Co., Inc., Extension—Air Freight*, 89 M.C.C. 369 (1961).

Finally, the Civil Aeronautics Board, the administrative agency charged with promoting and regulating air transportation, agrees that whether the motor transportation of air freight in a particular instance is or is not incidental to transportation by aircraft within the meaning of Section 203(b)(7a) of the Interstate Commerce Act is a question to be answered by the Commission. Thus, in its brief *amicus curiae* filed in the court below it said:

> "There is no conflict between the Board and the Commission, and the regulations of the two agencies were adopted in an effort to reach a practical accommodation with respect to the problems involved. As set forth in the government's brief, the Board is of the view that, since Section 203(b)(7a) is contained in the Interstate Commerce Act, the Interstate Commerce Commission has jurisdiction to initially determine its scope. While differences conceivably might arise between the agencies with respect to whether particular transportation falls within the statutory exemption, such differences would go to the correctness of the Commission's determination as opposed to its power to make it. In these circumstances, the Board has no objection to the Commission's reservation of jurisdiction in 49 C.F.R. 210.40, and perceives no reason why the Court need consider the question of the relative weight to be given to Board and Commission views when and if a conflict occurs."

There Is No Judicial Conflict

There is no "conflict among the circuits" as Appellants contend (Supp. J.S. 3). On the contrary, there is a uniformity of opinion between the court below and the only other two courts which have considered the question. In *City of Philadelphia* v. *Civil Aeronautics Board,* 289 F.2d 770 (D.C. Cir. 1961), the court agreed that the Federal Aviation Act does not vest in the Board regulatory authority over motor transportation preceding or following air transportation. In that case the Board held that an air carrier certificated to serve Philadelphia could discharge its duty to render adequate service by rendering it by aircraft to and from the airport at Newark, N. J. and by trucks between Newark and Philadelphia. In affirming that holding, the Court of Appeals said:

> "... we think the Board adequately and correctly disposed of [the argument that the motor movement between Newark and Philadelphia was not exempt from economic regulation by the Interstate Commerce Commission], when it said:
>
> > '• • • We are not asserting jurisdiction over the motor carrier as an air carrier nor are we determining the status of the truck operation under the Interstate Commerce Act. Whether the Philadepphia-Newark truck haul should be considered as incidental to air transportation within the meaning of the Interstate Commerce Ac , and thereby exempt from economic regulation under that statute, is a matter for the Interstate Commerce Commission.' "
>
> 289 F. 2d at 774.

True enough, in *Philadelphia* the Board held and the court agreed that the air carrier's service at issue would

"*as to it,* constitute air transportation." 289 F. 2d at 774, emphasis supplied. However, the Board's words "as to it" and the court's exposition in support of its conclusion (289 F. 2d at 773-774) make plain that no more was meant than that the air carrier was performing air transportation to and from Philadelphia within the meaning of Section 101(21) of the Federal Aviation Act and in compliance with its certificate notwithstanding that the aircraft did not physically arrive at and depart from the Philadelphia airport. As the court below said:

> "An interline movement of property partly by air and partly by motor vehicle may be air transportation for purposes of providing service to points for which a certificate of public convenience and necessity has been issued (under the Federal Aviation Act) and at the same time the motor [transportation] would not be incidental to the transportation of the property by aircraft." (J.S. 6a).

In *Wycoff Company, Inc.* v. *United States of America and Interstate Commerce Commission,* decided March 31, 1965, the United States District Court for the District of Utah affirmed the Commission's denial of a certificate of public convenience and necessity to perform the motor transportation of air freight to and from points beyond the terminal area of Salt Lake City established by the air carriers in tariffs filed with the Civil Aeronautics Board. The plaintiff's first attack on the Commission's order was stated by the three judge court as follows:

> "That the Commission does not have jurisdiction over ground transportation of commodities incidental to movement by aircraft and, hence, does not have authority to determine the limits of this exemption by decision or regulation; or at least that there is irreconcilable conflict between the authority of the Commission

and the Civil Aeronautics Board in this area." (Appendix A, p. 19.)

Rejecting this contention, the court held:

> "It is our opinion that the Commission clearly possessed jurisdiction to determine the extent of the statutory exemption provided by Section 203(b)(7a), supra.
>
> "The line of demarcation between exempt and unexempt service is equally important for the purposes of the application of permissible regulations to motor carriers and the withholding of inpermissible ones by the Commission. The Commission has the broad power 'to administer, execute and enforce all provisions . . .' of Part II of the Act dealing with motor carriers, 'to make all necessary orders in connection therewith, and to prescribe rules, regulations and procedures for such administration.' The determination of the area of exemption through case by case adjudication or by general rule subject to case by case application, is within the Commission's competence. And there appears no real dissonance, in theory or in practice, between the voices of the Commission and the Federal Aeronautics Board in this area, taking into consideration their respective objectives and functions in view of the national transportation policy." (Footnote omitted; Appendix A, pp. 20-21).

The court then went on to say that it agreed with the views of the court below in the case at bar and to point out that the plaintiff's reliance on *Philadelphia*, supra, was misplaced because that case "went no further than to hold that Flying Tiger's proposed service 'would, as to it, constitute air transportation and that in rendering (such) service the airline will be fulfilling its obligation under its certificate.'" Appendix A, p. 21, n. 13.

In their Supplement To Jurisdictional Statement Appellants wholly misconstrue *Railway Express Agency* v. *Civil Aeronautics Board,* decided March 18, 1965 by the United States Court of Appeals for the District of Columbia Circuit, in a vain effort to find a "conflict among the circuits." In that case REA, a surface common carrier operating under license from the Interstate Commerce Commission, entered into contracts with various airlines under which the latter agreed to carry freight moving in the service of REA at a fixed rate per 100 pounds. The Board refused to approve the contracts on the ground that they contemplated the performance of indirect air transportation by REA that the Board had previously refused it authority to perform. The basis of the Board's conclusion was that, *vis a vis* the shipping public, REA would assume responsibility to the shipper for the entire movement of his shipment, could charge a rate wholly unrelated to the rate REA paid the airline, and would determine whether or not to move the shipment by air, and, if so, by what airline. In short, the Board found that REA proposed to do precisely what it had licensed air freight forwarders to do.[4]

REA's argument was that its contracts contemplated through service between it as a licensed surface carrier and the airlines as licensed air carriers, which service is authorized by Section 1003(b) of the Federal Aviation Act

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[4] A freight forwarder is defined in Section 402(a)(5) of the Interstate Commerce Act as one who, *inter alia,* holds itself out to the public to provide, and assumes the responsibility for, transportation of property from point of receipt to point of destination and who utilizes, "for the whole or any part of the transportaton," the services of common carriers subject to the Interstate Commerce Act. However, Section 402(a)(7) excludes from regulation by the Commission that part of the operations of a forwarder "for the performance of which the services of an air carrier . . . are utilized, or for the performance of which transportation by motor vehicle exempted under the provisions of section 203(b)(7a) of this Act is utilized." Such operations constitute air freight forwarding, i.e., indirect air transportation, and are regulated by the Civil Aeronautics Board.

and is subject to regulation as to rates by a joint board of the Interstate Commerce Commission and the Civil Aeronautics Board. The Court of Appeals, accepting the Board's findings that REA proposed to engage in the business of air freight forwarding, i.e., in air transportation within the meaning of the Federal Aviation Act, held that Section 1003(b) could not be construed to permit the performance of air transportation by one not licensed by the Board. To quote the court:

> "That section merely provides a procedure for regulation of rates and practices in cases where an air carrier arranges with a surface carrier for through transportation services. When such an arrangement is made, and each participating carrier is operating within the proper scope of its authority, Section 1003 provides a method which may be invoked by either the Board or the Interstate Commerce Commission for regulating the participating carriers. But when, as in this case, an arrangement for through service calls for the surface carrier to perform operations which require permission from the Board, the surface carrier is not relieved of the necessity of obtaining such permission." (Supp. J.S. 11-12).

It is thus apparent that there is no conflict between the holding in the *REA* Case and the holding of the District Court here. On the contrary, the two holdings are in harmony. Just as the *REA* Case held that the Civil Aeronautics Board has authority to initially determine what constitutes air transportation subject to its regulation under the Federal Aviation Act, so the court below held that the Interstate Commerce Commission has authority to initially determine what constitutes motor transportation subject to its regulation under the Interstate Commerce Act. True enough, conflicts may arise. Thus the Inter-

state Commerce Commission might hold particular motor transportation subject to its regulation on the ground that it is not incidental to transportation by aircraft within the meaning of Section 203(b)(7a) of the Interstate Commerce Act and the Board might hold the same transportation subject to regulation by it on the ground that it is service in connection with air transportation within the meaning of Section 403(a) of the Federal Aviation Act. However, the Commission and the Board simultaneously promulgated regulations after consultation with each other. The Commission's regulations set forth the criteria for determining when motor transportation is incidental to transportation by aircraft. The Board's regulations (Appendix B hereto) set forth the same criteria for determining when motor transportation is service in connection with air transportation. Thus the possibility of conflict is remote. Should it arise in a particular case it can be, indeed must be, resolved by the courts in the exercise of their authority as the final arbiters of the scope of the jurisdiction of administrative agencies.[5]

Conclusion

In conclusion, we point out there is nothing unusual in the division of authority between two agencies of the federal government, each charged with implementing a different facet of Congressional policy. This makes con-

[5] The suggestion of the court below in its footnote 5 that conflict could be avoided by the use of a joint board created under Section 1003 of the Federal Aviation Act was not made in brief or argument to the court and reflects a misreading of that Section. As was pointed out in the *REA* Case, Section 1003 provides for a joint board only to deal with matters relating to "through service and joint rates." Section 1003(c). Whether the participants in through service have the requisite authority to perform transportation is a matter for independent determination, by the Board in the case of air transportation and by the Commission in the case of surface transportation. However, this casual suggestion of the court in no way affects the correctness of its judgment or of the opinion supporting it.

flict possible. See for example *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651 (1964) in which action by the Federal Power Commission under the Natural Gas Act was set aside as in conflict with the anti-trust laws. And see *United States* v. *Radio Corp. of America*, 358 U. S. 334 (1959), in which action by the Federal Communications Commission under the Communications Act was permitted to be challenged as in conflict with the anti-trust laws. It may be that the possibility of conflict between the Interstate Commerce Commission and the Civil Aeronautics Board will one day present the courts with a problem in a particular case. But this is no reason to refuse to interpret the governing statutes as the Congress wrote them.

For all of the foregoing reasons the judgment of the court below should be affirmed.

Respectfully submitted,

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April 21, 1965.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

No. C 108-62

WYCOFF COMPANY, INCORPORATED, *Plaintiff*,

v.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, *Defendants*.

Before Honorable DAVID T. LEWIS, United States Circuit Judge, Honorable WILLIS W. RITTER, Chief United States District Judge, and Honorable A. SHERMAN CHRISTENSEN, United States District Judge.

Harry D. Pugsley, Esquire, for plaintiff.

John H. D. Wigger, Esquire, Attorney, Department of Justice, and William T. Thurman, Esquire, United States Attorney for the District of Utah (William H. Orrick Jr., Assistant Attorney General of the United States, with them on the briefs), for the United States of America.

Thomas H. Ploss, Esquire, Assistant General Counsel, Interstate Commerce Commission (Robert W. Ginnane, Esquire, General Counsel and Leonard S. Goodman, Esquire, Assistant General Counsel, Interstate Commerce Commission, with him on the briefs), for the Interstate Commerce Commission.

MEMORANDUM DECISION

CHRISTENSEN, D. J.

By this action in which a statutory [1] three-judge court has been convened the plaintiff, Wycoff Company, Inc., challenges the report and order of the Interstate Commerce

[1] 28 U.S.C. §§ 2284 and 2321-25. See also 28 U.S.C. §§ 1336, 1338.

Commission[2] determining the extent to which plaintiff's motor carrier service to and from the Salt Lake City Airport is exempt from regulation under Section 203(b)(7a) of the Interstate Commerce Act, 49 U.S.C. 303(b)(7a)[3] and finding that the public convenience and necessity did not justify related operations by plaintiff beyond such exemption.

Plaintiff began airfreight service to and from the Salt Lake City Airport outside the scope of its existing certification by the Commission as a motor carrier of property in the belief that such operations were exempt from regulation notwithstanding that they involved in instances motor transportation up to several hundred miles. Apparently to set developing questions at rest, in 1958 plaintiff filed with the Commission an application for a certificate of public convenience and necessity authorizing it to transport commodities having a prior or subsequent movement by aircraft between the Salt Lake City Airport and places in Utah and surrounding states already served by plaintiff under its existing authority to transport newspapers, motion picture film and other express-type commodities.[4] In the alternative, or to the extent these operations were not to be authorized by certificate, plaintiff requested the Commission to determine that its motor carrier service was exempt as "incidental to transportation by aircraft" within the meaning of Section 203(b)(7a), supra.

Plaintiff's application was protested by common carriers of property holding certificates for competing operations; a hearing was had, and the Commission examiner, without

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[2] *Wycoff Company, Incorporated, Extension-Airfreight*, Docket No. MCC-89684 (Sub. No. 23), 89 M.C.C. 369, reaffirmed except for minor changes not here in question by an order of the full Commission dated May 22, 1964.

[3] "Nothing in this Chapter, except the provisions of 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment, shall be construed to include . . . 7(a) the transportation of persons or property by motor vehicle when incidental to transportation by aircraft."

[4] Authority for certain additional routes also was sought by the applicant and denied by the examiner, but these are not in issue here.

attempting to delineate the extent of the (7a) exemption, recommended that the Commission grant a certificate for most of the services proposed by plaintiff. On November 22, 1961, the Commission (Division 1), entered its report and order defining the exempt operations in harmony with the limiting [5] guidelines which it theretofore had established in the *Kenny* case,[6] accepting the examiner's findings of fact, but determining contrary to the conclusions of the examiner that the plaintiff has not established a public need for any of its proposed operations beyond the exempt zone. Plaintiff's petition for reconsideration of this decision was denied, and suit in this court was instituted on June 25, 1962.

In the meantime, a broad rule making proceeding [7] had been instituted by the Commission for the purpose of generally interpreting by regulation the statutory exemption of "transportation incidental to movements by aircraft." On September 21, 1962, the Commission entered an order reopening the proceeding on review here, for future consideration in light of possible developments in the rule making proceeding. After extended hearings in the latter proceeding, rules on the subject were adopted by the Commission on May 4, 1964.[8] These rules generally followed

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[5] The exempt operations were generally confined by the adopted formula, for reasons hereafter discussed, to an area within 25 miles of the airport.

[6] *Kenny Extension—Air Freight, 61 M. C. C. 587 (1953).* In this decision pickup and delivery areas described in tariffs filed by airlines with the Civil Aeronautics Board were accepted by the Commission as establishing *prima facie* exempt zones. Within these zones, motor transportation of air freight was accepted by the Commission as incidental to transportation by aircraft, permitting airlines, freight forwarders and shippers to use the partially exempt motor carriers although not certificated for these operations. Beyond these zones, airlines and shippers were required to use certificated motor carriers, unless specific applications were approved by the Commission for enlargement of the zone in view of special circumstances.

[7] No. MC-C 3437, *Motor Transportation of Property Incidental to Transportation by Aircraft.*

[8] *Motor Transportation of Property Incidental to Transportation by Aircraft,* 95 M. C. C. 71. The regulations have been codified as 49 C. F. R. 210.40 and 404, 404.1. The text of the regulations also is set out in 95 M. C. C. 94-95.

the rationale of the *Kenny* case, supra, so far as material here. On May 22, 1964, the Commission entered an order modifying its previous order to formally harmonize the two proceedings, but the modification constituted a substantial affirmation. Thus, the modified order dismissed plaintiff's application for a certificate of public convenience and necessity insofar as the proposed operation was exempt in terms of the new regulation rather than merely with reference to the *Kenny* case, and denied the application for certification of proposed operations beyond the exemption defined in the regulation.

The plaintiff attacks the action of the Commission by three contentions:

1. That the Commission does not have jurisdiction over ground transportation of commodities incidental to movement by aircraft and, hence, does not have authority to determine the limits of this exemption by decision or regulation; or at least that there is irreconcilable conflict between the authority of the Commission and the Civil Aeronautics Board in this area.

2. In the event the Commission had jurisdiction to make the determination in question, it erred in its application of the law by engrafting upon the statutory exemption in effect a mileage limitation; or a zone limitation keyed to the tariff schedules filed by the airlines with the approval of the Civil Aeronautics Board.

3. The Commission's reversal of the examiner's conclusions and its denial of a certificate of public convenience and necessity for the proposed operations beyond the statutory exemption as interpreted, were arbitrary and capricious.

Before discussing these claims it must be decided procedurally whether we should consider certain evidence tendered by plaintiff *dehors* the record made before the Commission. The rule is well settled that proceedings such as this are not *de novo*, and ordinarily it is improper to allow the Commission's findings to be attacked or supported in court by evidence which the Commission had no

opportunity of considering.[9] We do not believe that departure from established principles is warranted by the fact of the rule making proceeding or the subsequent entry of the modified order after the filing of plaintiff's original complaint; nor does the limited purpose for which the new evidence was offered [10] justify it. In any event, the preferred evidence was not of a character to throw into question the conclusions reached here.

It is our opinion that the Commission clearly possessed jurisdiction to determine the extent of the statutory exemption provided by Section 203(b)(7a), supra.

The line of demarcation between exempt and unexempt service is equally important for the purposes of the application of permissible regulations to motor carriers and the withholding of impermissible ones by the Commission. The Commission has the broad power "to administer, execute and enforce all provisions . . ." of Part II of the Act dealing with motor carriers, "to make all necessary orders in connection therewith, and to prescribe rules, regulations and procedures for such administration." [11] The determination of the area of exemption through case by case adjudication or by general rule subject to case by case application, is within the Commission's competence. And there appears no real dissonance, in theory or in practice, between the voices of the Commission and the Federal Aeronautics Board in this area, taking into consideration their respective objectives and functions in view of the national transportation policy. The convincing foundations for these conclusions have been so recently and well stated by another three-judge court, with the views of which we agree, as to make extended discussion

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[9] *Louisville & Nashville Railroad Co.* v. *United States*, 282 U. S. 740 (1931); *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282 (1934); cf. *American Trucking Ass'ns.* v. *United States*, 344 U. S. 298 (1953).

[10] "To assist the court in making a proper interpretation of the true scope of the exemption statute."

[11] Section 204(a)(6) of the Interstate Commerce Act, 49 U. S. C. 304 (a)(6); *American Trucking Assn., Inc.* v. *United States*, 344 U. S. 298 (1953).

here on the point unnecessary.[12] The reliance placed by plaintiff upon the so-called *Flying Tiger* decision to establish conflicting jurisdiction in the Civil Aeronautics Board is misplaced.[13]

Having concluded that the Interstate Commerce Commission had jurisdiction to define the scope of the exemption granted by Section 203(b)(7a), and to regulate plaintiff's operations beyond the exempted operations as so defined, it is necessary to determine whether the regulation and decision constitute an arbitrary, unreasonable or unlawful exercise of the Commission's discretion. We are satisfied that they do not.

In MC-C-3437, the rule making proceeding which furnishes the basis of the Commission's order under attack, it is held (insofar as material here) that "(t)ransportation of property by motor vehicle is transportation incidental to transportation by aircraft within the meaning of section 203(b)(7a) . . . provided (1) that it is confined to the transportation of shipments in bona fide collection, delivery, or transfer service performed within the terminal area of the direct aircarrier . . . providing the line-haul transportation, which . . . if the line-haul air transportation is provided by a carrier subject to economic regulation under the Federal Aviation Act, has been described in a

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[12] See *Air Dispatch Inc.* v. *United States and Interstate Commerce Commission*, No. 36000, D. C. D. Pa. 1964 ——— F. Supp. ———. In this decision Judge Davis concludes for the court: "The determination of the scope of this exemption from economic regulation must logically fall on the Commission. Whether this determination is accomplished on an *ad hoc* basis as in *Kenny* and the cases following that decision or by use of the rule making power, does not alter the right to make such a determination."

[13] *City of Philadelphia* v. *Civil Aeronautics Board*, 289 F2 770 (D. C. Cir. 1961). The decision of the Board as sustained by the Third Circuit [sic] went no further than to hold that Flying Tiger's proposed service "would, as to it, constitute air transportation and that in rendering (such) service the airline will be fulfilling its obligations under its certificate." The Board had added that "(I)f the (Interstate Commerce) Commission should conclude under the standards normally applied by it that the truck operation is not exempt, the trucker must have or obtain the requisite I. C. C. authority in order for Flying Tiger Lines to operate in the manner it proposes."

tariff filed with and accepted by the Civil Aeronautics Board, and (2) that it is confined to the transportation of shipments which have been received from or will be delivered . . . as part of a continuous movement which, if provided by an air carrier subject to economic regulation under the Federal Aviation Act, shall be *provided for in tariffs filed with and accepted by the Civil Aeronautics Board*, and shall be performed on a through air bill of lading covering, in addition to the line-haul movement by air, the collection, delivery, or transfer service performed by the motor carrier."[14] (Emphasis added.)

It is to the provision emphasized above, confining the exempted transportation to shipments constituting a part of a continuous movement provided for in tariffs accepted by the Civil Aeronautics Board, that plaintiff particularly objects, since such tariffs ordinarily are not approved by the Board if they involve terminal deliveries beyond 25 miles from an airport. This regulation, plaintiff argues, places a mileage restriction upon the meaning of "incidental," contrary to the intent of the exemption statute. The further objection is raised that if the Commission has power to determine the scope of the exemptions, it may not delegate this to either the air carrier over which it has no jurisdiction or to the C.A.B. And plaintiff contends that the Commission fell into its "error" because of its or the Board's preoccupation with ground services from airports in congested eastern areas bearing no comparison to the situation of western airports spaced "several hundred miles apart."

The discussion in MC-C-3437 *Motor Transportation of Property Incidental to Transportation by Aircraft*, 95 M.C.C. 71 et seq., supra, outlines the considerations leading to the adoption of the regulations and orders under attack.[15] The Commission has recognized that inflexible

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[14] 49 C. F. R. 210-40. Additional provisions in the regulation for temporary substitution of motor-for-air transportation due to emergency conditions, and others covering airfreight forwarders, are not here pertinent.

[15] Among other things it is said: "The Kenny case went on to find that there was no need to define specifically the geographical limits within

mileage restrictions should not be imposed but that the relationship of airline tariffs approved by the Board to incidental transportation services furnishes at least a general practical guide, subject to re-evaluation by the Commission under special circumstances.[16] The plaintiff complains because the Commission in evaluating the circumstances of this case did not extend the exempt zone to include a large industrial plant situated slightly beyond 25 miles from the airport and hence not included in approved airline tariffs. We cannot say that even this exclusion was arbitrary or capricious in view of the entire record. But this complaint is a mere incident of plaintiff's

which exempt transportation might be performed. Instead, it provided that in order to come within section 203(b)(7a), transportation must be performed within the terminal area established by the line-haul air carrier in tariffs filed with the C.A.B. The assumption underlying this approach to the determination of the scope of the exemptio was that the C.A.B. would not hesitate to reject a publication which ould result in an unreasonably large exempt area. Our re-evaluation of the situation in the light of the representations filed in the instant proceeding convinces us that this aspect of the Kenny decision, too, is correct and that the imposition of a definite mileage limitation is unnecessary. In reaching this conclusion, we have attached considerable significance to the representations of several of the parties specializing in the transportation of air freight. They have taken the position that the present standard has encouraged the development of airfreight service, and that it should be retained. The C.A.B.'s actions since the promulgation of the Kenny criteria, particularly as reflected in the rules, contained in Appendix II hereto, which it has adopted, clearly illustrate that agency's reluctance to sanction any wholesale expansion of air-carrier terminal areas beyond the 25-mile rule of thumb which it has used for many years . . ." 95 M.C.C. p. 85.

[16] "(c) Individual determination of exempt zones.—Upon its own motion or upon petition filed by any interested person, the Interstate Commerce Commission may, in an appropriate proceeding, determine whether the area within which the transportation of property by motor vehicle, in bona fide collection, delivery, or transfer service, must be performed, in order to come within the provisions of paragraph (a) of this section, should be individually determined with respect to any particular airport or city authorized to be served by a direct air carrier or air freight forwarder, holding authority from the Civil Aeronautics Board, and whether there should be established therefor appropriate boundaries, differing in extent from the terminal areas of such direct air carriers or freight forwarders as defined in tariffs filed with and accepted by the Civil Aeronautics Board." 95 M.C.C. 95.

argument which involves a frontal attack on any restriction which would preclude its transportation of airfreight under a through air bill of lading from the Salt Lake Airport to any place specified in the bill of lading. We agree with the defendants that to allow a motor carrier by virtue of any claimed exemption from regulation to transport shipments any distance so long as they had prior or subsequent movements by aircraft, could only result in the rapid deterioration of effective motor carrier regulation in interstate commerce.

Movements of freight by motor carriers "incidental to transportation by air" within the contemplation of the statute must mean something different than "motor carrier movements preceding or following air transportation." The required relationship to air transportation must be an *incidental* one. In considering the meaning of the exempting language it appears proper and necessary to consider the nature and circumstances of the air transportation, including the holding out of its extent by the approved tariffs of the airlines. To constitute a movement incidental to air transportation, we believe that such movement must be incidental to some particular air transportation, not merely to the broad system of air traffic as a whole. Being incidental, one of the relevant circumstances would seem to be its context with the regulatory plan to which the airline in question is subject. This is not the only possible factor, and indeed it is not accepted as such by the Commission's regulation. Yet it is a relevant circumstance historically, practically and conceptionally, the application of which in this case cannot be deemed to be irrational. A similar recognition of the limiting meaning of the term in relation to the actual operations of the airlines will go far toward answering the plaintiff's contention that the regulation must necessarily be tailored specially for areas where airports, and particularly those receiving jet aircraft, are widely spaced, and that the existing ones are arbitrary and unrealistic as applied particularly to the Salt Lake area.[17] Congress by the exception could not have

[17] "The commission's interpretation," says plaintiff, "would make 'incidental' a provincialism, wholly unrealistic in light of the vast western area between airports."

meant to fill the gaps between airports however extended, by a wholesale substitution of unregulated motor carrier service. The exception covers handling of airfreight by motor carrier only to the extent that this reasonably can be deemed incidental to air transportation facilities and services in actual operation.

We conclude that the definition of the exempt zone, as applied to plaintiff's operations,[18] was not inconsistent with the statute, was not unreasonable nor arbitrary, was justified by adequate findings of fact supported by competent evidence, and was in keeping with persuasive historical and practical considerations. Since the decision under review with respect to the exemption rests upon a rational basis, the informed discretion of the Commission must be upheld.[19]

The record also supports the findings and conclusions of the Commission that plaintiff failed to establish a present or foreseeable future need for that part of the proposed service embracing "nonexempt" movements of air freight between the Salt Lake City Airport and points outside the air carriers' terminal areas on presently authorized routes, despite the recommendations of the examiner to the contrary.[20]

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[18] The Commission found that the proposed operation by applicant as a common carrier by motor vehicle is exempt from certificate requirements to the extent that it is confined to the transportation in bona fide collection, delivery, or transfer service of shipments which have been received from or will be delivered to, an air carrier as part of a continuous movement under a through air bill of lading covering, in addition to the line-haul movement by air, the collection, delivery, or transfer service performed by applicant between the Salt Lake City Airport, Utah, on the one hand, and, on the other, points named in the Salt Lake City Airport tariffs of the air carriers performing the air portion of the line-haul transportation of such shipments as filed with the Civil Aeronautics Board.

[19] *American Trucking Assn.* v. *United States*, supra, 344 U. S. 298 (1953); *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194 (1947).

[20] The Commission found that the examiner's findings to the extent they went were accurate and entitled to adoption as supplemented by the Commission, but that despite the efficient service of the plaintiff as found by the examiner: "Six motor common carriers of general commodities with exceptions, collectively can provide regular-route service

The Commission's denial of a certificate was pursuant to statutory authority.[21] Its decision is supported by adequate findings and conclusions based on substantial evidence.[22] One of the basic ingredients in the determination of public convenience and necessity is the adequacy of existing service, and the applicant has the burden of producing evidence to show that the proposed service to the extent to be authorized by the certificate is or will be required by the present or future public convenience and necessity.[23] Adequacy of existing services is a proper subject of consideration in this field.[24] The Commission's conclusions are not vulnerable merely because they overruled those of the examiner. The Commission, not the examiner,

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throughout the area involved serving Salt Lake City. As to those points involved not directly within their own operating authorities, service is provided by interlining with other motor carriers . . . They are willing and able to provide a scheduled pickup and delivery service at the airport conducted on a 24-hour basis, 7 days a week . . . Although an increase in airfreight traffic is anticipated, the evidence is not convincing that such increase will occur outside the terminal area, from and to which the bulk of this traffic now moves. Applicant's unauthorized operations outside of this terminal areas have deprived authorized carriers of traffic they are qualified to transport . . . Further, there is no evidence that the abundant existing service is inadequate in any material respect to meet supporting witnesses' needs."

[21] 49 U.S.C § 307(a) provides that "a certificate shall be issued to a qualified applicant therefor . . . if it is found . . . that the proposed service . . . is or will be required by present or future public convenience and necessity; otherwise such application shall be denied. . . ."

[22] *Riss & Co., Inc.* v. *United States*, 100 F. Supp. 468 (D.C. W.D. Mo. 1951) aff'd. 342 U. S. 937 rehrg. denied 343 U. S. 937; cf. *Public Service Commission of Utah* v. *United States*, 356 U. S. 421 (1958); *Utah Citizens Rate Association* v. *United States*, 192 F. Supp. 12 (D.C. Utah 1960), aff'd. 365 U. S. 649.

[23] *Hudson Transit Lines, Inc.* v. *United States*, 82 F. Supp. 153 (S. D. N. Y. 1948); *Quickie Transport Company* v. *United States*, 169 F. Supp. 826 (D. C. Minn. 1959), aff'd. 361 U. S. 36.

[24] *Hudson Transit Lines Inc.* v. *United States*, 82 F. Supp. 153 (S. D. N. Y. 1948) aff'd. 338 U. S. 802; *Parkhill Truck Co.* v. *United States*, 198 F. Supp. 362 (D. C. Okl. 1961); *Filson* v. *I.C.C.* 182 F. Supp. 675 (D. C. Colo. 1960); cf. *Schaffer Transp. Co.* v. *United States*, 355 U. S. 83 (1957).

exercises the determinative judgment and discretion.[25] In this respect, also, the rational basis of the order is sufficient to require its approval.[26]

The order of the Commission is in all respects affirmed.

Dated this 31st day of March, 1965.

/s/ DAVID T. LEWIS
/s/ WILLIS W. RITTER
/s/ A. SHERMAN CHRISTENSEN

[25] *Pobbins* v. *United States*, 204 F. Supp. 78 (E.D. Pa. 1962).

[26] *Mississippi Valley Barge Line Co.* v. *United States*; supra, 292 U. S. 282 (1934); *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541 (1912); *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60 (1945); *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515 (1946).

APPENDIX B

Regulation No. ER-407

UNITED STATES OF AMERICA
Civil Aeronautics Board
Washington, D. C.

Economic Regulations

Enactment of Part 222

Effective: June 12, 1964

Adopted: April 28, 1964

PART 222—AIR CARGO PICKUP AND DELIVERY ZONES; FILING OF TARIFFS; APPLICATION FOR AUTHORITY TO FILE

By Notice of Proposed Rule Making, 26 F.R. 8037, and Economic Draft Release No. 33, Docket 12951, the Board announced it had under consideration a new Part 222 of the Economic Regulations relating to the determination of zones for air cargo pickup and delivery services which may be provided pursuant to appropriate tariff filings. Therein the Board described the current practice under which an air carrier decides at which locations it wishes to provide pickup and delivery service (if at all) in and around a particular point certificated to receive air service, and files a pickup and delivery tariff with the Board setting them out. In deciding whether to accept or reject the tariff, the Board has used distance criteria. Generally speaking, tariff proposals for pickup and delivery service at distances extending beyond 25 miles either from the airport through which the carrier serves the particular point, or from the corporate limits of the city, have not been regarded as acceptable. In a number of instances, tariffs providing for services substantially beyond a 25-mile limit have been permitted to become effective, particularly at the more important certificated points.

The notice stated that the procedure of regulating terminal area services through tariff rejections under the 25-mile rule of thumb has been challenged both on a procedural

basis as well as with respect to substantive validity. In that connection, the Board noted the differing views of the various classes of air carriers which had been previously solicited as to the need for changes in the Board's air cargo pickup and delivery tariff procedures and policy.

The Board sought comments on a proposed rule which contemplated the acceptance of pickup and delivery tariffs for services (a) within an area of 50 miles of the municipal center of any point receiving air service, and (b) within any "authorized pickup and delivery zone" as might be specifically established by the Board for the major air cargo generating points. It also contemplated an application procedure under which pickup and delivery service could be considered to locations which had not been previously authorized pursuant to (a) and (b) above.

The Board's notice adverted to the jurisdictions of the Civil Aeronautics Board and the Interstate Commerce Commission in relation to air cargo pickup and delivery services. The Board's jurisdiction is confined to the acceptance or rejection of pickup and delivery tariffs filed under section 403(a) of the Federal Aviation Act as service "in connection with . . . air transportation" while the Interstate Commerce Commision must decide whether such surface transportation is a service which is "incidental to transportation by aircraft" under the Interstate Commerce Act and thus exempted pursuant to section 203(b)(7a) of Part II of that statute or alternatively, whether a certificate of public convenience and necessity must be issued by that Commission authorizing such service. The notice stated that obviously the Board and the Commission should strive to administer the respective Acts so that there is no undue conflict between what the Board considers "service in connection with . . . air transportation" and what the Commission considers service "incidental to transportation by aircraft." In this connection, the Interstate Commerce Commission instituted a rulemaking proceeding in October 1961 [1] to determine and prescribe by regulation the cir-

[1] Motor Transportation of Property Incidental to Transportation by Aircraft (No. MC-C-3437).

cumstances under which, and the areas or distances within which, the motor carriage of property in interstate or foreign commerce is transportation incidental to transportation by aircraft within the meaning of section 203(b)(7a) of the Interstate Commerce Act.

In his Transportation Message to Congress of April 5, 1962, the President stated that he was "requesting the Chairmen of the Civil Aeronautics Board, the Interstate Commerce Commission, and the Federal Maritime Commission, to meet at frequent intervals to discuss regulatory problems affecting the various modes of transportation and to seek coordinated solutions in the form of legislative or administrative action that will improve the regulatory process." Pursuant to the request, inter-agency committees have been established on Terminal Area matters, and Freight forwarder matters, and meetings for the consideration of their problems have been held on the Commission and staff levels.

In the Board's rulemaking proceeding, extensive comments were received as a result of the original notice and a supplemental notice, dated February 5, 1963, which sought specific information as to the adequacy of ICC licensed trucker services for air cargo pickup and delivery beyond the 25-mile zone.

On the basis of the extensive information which has been made available to the Board we have reached these conclusions: full development of air cargo transportation depends, in large measure, upon efficient surface transportation; effective customer-oriented pickup and delivery service can best be guaranteed when it is under the control of the direct air carrier or the air freight forwarder; this control can be maintained by the operation of trucks directly by the air carrier and the air freight forwarder or under contract with local cartage agents; and a reasonable amount of freedom for the direct air carriers and air freight forwarders to establish pickup and delivery services and to test their adequacy and economy is vital to prevent a stifling of the potential of air cargo transportation.

There are numerous certificated points which have only limited pickup and delivery services or where such service

extends to the corporate limits of the community or only slightly beyond. This situation apparently reflects the current limited use of air cargo at these points. For these communities, it is clear that the Board's present procedure of accepting tariffs under the 25-mile rule of thumb is adequate and raises no significant regulatory question for either the CAB or the ICC.

We therefore need be concerned with only the relatively few major air cargo generating points—where today effective tariffs on file with the Board provide for extensive pickup and delivery services which, in several cases, go well beyond the 25-mile rule-of-thumb area. In those instances where true pickup and delivery services are provided in relatively small vans or straight trucks and geared to air carrier schedules, such services appear to constitute "service in connection with air transportation," and we have no reason to believe that such tariffs are not properly filed. Furthermore, to the extent that additional direct air carriers or air freight forwarders desire to file pickup and delivery tariffs of their own proposing similar service in these areas, they will also be accepted.

There remains the question of considering any requests by direct air carriers or air freight forwarders for extension of pickup and delivery services beyond the areas covered by existing tariffs or the established 25-mile rule-of-thumb area. The Board believes that this should be considered only on the basis of an application procedure (similar to that set forth in our notice of proposed rulemaking) which would provide for notice to and comments by interested persons. The Board will consider any such requests in the light of whether the proposed service is truly air cargo pickup and delivery with the use of specialized equipment (vans or straight trucks) and geared to meeting airline schedules and oriented to customer air transportation needs, as distinguished from line-haul or over-the-road surface transport. The Board would receive and consider any comments by over-the-road truckers and particularly any evidence as to whether the proposed service is in the nature of surface line haul.

Subsequent acceptance by the Board of air cargo pickup

and delivery tariffs under these standards would not, of course, interfere with the freedom of the ICC to determine whether the related motor transportation did or did not come within the section 203(b)(7a) exemption. The Board anticipates, however, that the ICC will give due and appropriate weight to the Board's findings that the contemplated services are truly air cargo pickup and delivery in nature, as it does today.

In consideration of the foregoing, the Civil Aeronautics Board hereby adopts, effective June 12, 1964, new Part 222 of its regulations (14 CFR Part 222), to read as follows:

Sec.

222.1 Applicability

222.2 Filing of tariffs

222.3 Service to locations not previously authorized.

§ 222.1 *Applicability.* This part is applicable to the provision of pickup and delivery services in connection with air transportation of property at any point within the United States or its territories and possessions by any carrier subject to Part 221 of the Board's Economic Regulations.

§ 222.2 *Filing of tariffs.* In accordance with the provision of Part 221 and this regulation, each carrier shall file tariffs covering all pickup and delivery services offered. Such tariffs will be accepted for filing if they meet the requirements of Part 221 of this subchapter and (a) provide for service to places which are not located beyond a radius of 25 miles of the airport or of the city limits of the certificated point, or (b) provide for service to places or areas included in other currently effective pickup and delivery tariffs on file with the Board, or (c) are authorized upon application of the carrier filed in accordance with section 222.3. A certification shall accompany each tariff filing identifying the category within which each pickup and delivery service falls.

§ 222.3 *Service to location not previously authorized.*

(a) *Application.* If a carrier, subject to this part, desires to file a tariff providing for pickup and delivery serv-

ice to any location(s) not authorized by section 222.2, such carrier shall file with the Board a written application for authority to do so. Such application, in an executed original and nineteen copies, shall be conspicuously entitled "Application for Tariff-filing Authority: Pickup and Delivery Zone"; shall clearly identify the location(s) for which tariff-filing authority is requested; shall state the reasons why service to such location(s) is deemed appropriate and set forth economic data and other facts relied upon; shall contain a notice that persons served may, within 15 days, file and serve an answer in support of or in opposition to the application; shall set forth the names and addresses of the persons required to be served and state that service has been made on all such persons by personal service or by registered or certified mail, and the date of such service. In the case of service by mail, the date of mailing shall be considered the date of service. Each copy of an application served pursuant to this part shall state that such service is made pursuant to Part 222 of the Civil Aeronautics Board's Economic Regulations.

(b) *Service of application.* A copy of each application shall be served upon such persons as the Board may designate in a particular case, and in all case shall be served upon each scheduled air carrier and air freight forwarder which regularly renders service to or from a point involved, and upon the Secretary, Interstate Commerce Commission, Washington, D. C. The Board shall also publish notice of the application in the Federal Register.

(c) *Answers.* Any interested person may file an answer with the Docket Section of the Board in opposition to or in support of an application. In the case of persons served by the applicant under paragraph (b) of this section, answers shall be filed no later than 15 days after the filing of the application. In the case of other interested persons, answers shall be filed no later than 15 days after publication of notice of the application in the Federal Register. An answer shall be filed in an executed original and nineteen copies. It shall set forth in detail the reasons for the position taken and include such economic data and facts as are relied upon. It shall also be served upon the applicant

and state the date of such service. Unless ordered by the Board upon application or upon its own motion, further pleadings will not be entertained.

(d) *Order of approval.* Tariffs to which this paragraph relates shall not be filed unless and until the Board by order approves the application finding that the proposed tariff involves service in connection with air transportation.

(e) *Effectiveness of authority.* Authority to include any location(s) in a pick-up and delivery tariff granted pursuant to the procedure of this section shall be subject to revision or revocation without evidentiary hearing.

(Section 204(a), 72 Stat. 743; 49 U.S.C. § 1324. Interpret or apply Section 403; 72 Stat. 758, as amended by 74 Stat. 445; 49 U.S.C. § 1373)

By the Civil Aeronautics Board:

HAROLD R. SANDERSON,
Secretary.

(SEAL.)

(4699-5)